SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

SOUTHWESTERN CABLE CO., MIDWEST CABLE TV, INC., PACIFIC VIDEO CABLE CO., AND TRANS-VIDEO CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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I

In our principal brief we showed that CATV constitutes interstate communication by wire subject under Section 2(a) (47 U.S.C. 152(a)) to the provisions of the Communications Act; that the Commission's exercise of jurisdiction over CATV is limited to the interception and dissemination of television signals by this form of interstate wire communication; and that this jurisdiction is based upon the provisions of the Act specifically defining the Commission's responsibilities regarding broadcasting and

in particular authorizing it to provide for a nationwide plan for allocating free television service through local stations.

We also showed that, in regulating CATV systems, the Commission is not engaged in a comprehensive licensing and regulatory program. Under its Second Report and Order and the prescribed regulations the Commission exercises authority only over CATV carriage and distribution of signals broadcast by television stations. Moreover, its limitation on the importation of distant signals into major television markets is provisional in nature and is directed toward ensuring that the agency has an adequate opportunity to study and reflect, on a case-by-case basis, the public interest considerations relating to CATV growth in large metropolitan areas. In view of the restricted scope of the Commission's asserted jurisdiction and the approach initially taken by the agency, the contentions by respondents and the *amici curiae* that the Commission is claiming an unlimited and standardless regulatory authority wholly misconceive the nature of the instant case.

Respondents argue that as a matter of statutory construction the Commission lacks power to regulate CATV dissemination of television signals because the Communications Act specifically provides a comprehensive scheme of regulation only in regard to common carriers and persons actually engaged in radio transmission. In respondents' view, the jurisdiction of the Commission is rigidly compartmentalized into common carrier regulation and broadcast station

licensing, and it therefore lacks authority to regulate non-microwave CATV systems in any respect.

Plainly, however, the Commission's authority under the Act is not and was never intended to be so narrowly circumscribed. Section 2(a) by its terms applies "to *all* interstate and foreign *communication* by wire or radio * * * and to all persons engaged *within* the United States *in such communication* or such transmission of energy by radio * * *" (emphasis added). Section 3(a) (47 U.S.C. 153(a)) defines "[w]ire communication" in sweepingly broad language. Moreover, in Title III of the Act Congress conferred upon the Commission comprehensive powers and duties listed in Section 303, established a licensing scheme to allocate facilities under Section 307, and conferred rulemaking authority commensurate with these responsibilities in Sections 4(i) and 303(r). (47 U.S.C. 154(i) and 303(r)).

The essential purpose of the statutory pattern—control over all channels of radio transmission (47 U.S.C. 301)—could not be achieved if a form of interstate wire communication were able to extend and disseminate broadcast signals without regard to the Commission's regulations allocating frequencies and zones for those signals. It is not necessary for the Commission to have plenary authority over all aspects of CATV operations in order to regulate CATV at all. All that is required is that the agency have authority to adopt rules regulating CATV in the respects in which it has in fact acted. It has acted to regulate CATV only in regard to the potential impact and effect of that form of wire communication on its congressionally mandated plan for the allocation of free

television service among the various parts of the country. Surely the plain language of the Communications Act supports Commission jurisdiction to regulate CATV in that limited respect.

Respondents' position would significantly frustrate the purposes of the Act by requiring of Congress "an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219). In essence, they seek a "stereotyp[ing of] the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding" (*ibid.*). That sort of niggardly approach toward construing the scope of the Commission's powers has been consistently rejected by this Court. It was expressly rejected, in regard to the Commission's jurisdiction over non-microwave CATV, in *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, C.A.D.C., No. 20274, decided June 30, 1967, where the court of appeals concluded that the Commission's powers are not "rigidly compartmentalized into 'licensing' and 'public utility regulation' functions" (Pet. App. D 73, n. 19). Moreover, it is beside the point that the Act does not set forth express standards for the regulation of non-common carrier wire communication. Its standards for the regulation of broadcasting are quite specific—Section 303 adopts the familiar criterion of "public convenience, interest, or necessity" as the guide for exercise of the powers enumerated. When a form of wire communication involves itself with the dissemina-

tion of broadcast signals, it becomes subject to those standards. If those standards are adequate in regard to broadcasting, they are similarly sufficient for the regulation of a form of wire communication which directly relates to and affects broadcasting.

Contrary to the view of respondents, the recent enactment of the all-channel receiver law (47 U.S.C. 303(s)) does not undermine the basis of the Commission's asserted jurisdiction. This legislation reflected the desire of Congress to give greater effect to the Commission's channel-allocation plan by increasing the number of television sets capable of receiving UHF signals. But the Commission had no jurisdiction over the capabilities of home receivers because the manufacture and sale of television sets does not constitute a form of interstate communication by wire or radio. Hence, specific legislation was necessary.

Even assuming that the Act's legislative history could defeat the plain intendment of its language, it is not to the contrary. Although Congress built largely upon existing law dealing with existing modes of communication in adopting the 1934 Act, it was well aware that it was giving the Commission comprehensive powers to deal with future developments. *E.g.*, S. Rep. No. 781, 73d Cong., 2d Sess., p. 1; H. Rep. No. 1850, 73d Cong., 2d Sess., p. 3; see *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 219–220. Congress obviously did not have CATV specifically in mind in 1934, any more than it then had foreknowledge of the development of television, but it wisely delineated broad areas of regulatory authority under a public interest standard which, upon their evolution, encompasses both.

Nothing in the instant case requires a probing of the limits of the Commission's power to regulate various forms of interstate communication by wire. Each form would raise its own questions of the need for regulation and the nature and statutory basis of any proposed rules. Since the Commission has not asserted plenary authority over CATV systems, but only such authority over an activity using broadcast signals as is necessary to carry out particular statutory directives relating to broadcasting, no question is here raised regarding the nature of possible regulation of other forms of communication.[1]

Nor does the history of legislative proposals designed to confer or confirm jurisdiction over CATV reduce the Commission's powers under the Act. Al-

[1] Accordingly, any reliance on the nature of the Commission's assertion of regulatory authority over television networks is misplaced. Networks are of course subject to pervasive Commission regulation with respect to network-owned stations. And they are specifically governed by Section 303(i) (47 U.S.C. 303(i)), giving the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; the Commission has thus considered that it has ample authority to adopt rules governing networks directed both to the network affiliate and the network television licensee. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190; Notice of Proposed Rule Making and Inquiry in Docket No. 16041, concerning rules with respect to competition and responsibility in network television broadcasting (30 Fed. Reg. 7666, 7668); Notice of Proposed Rule Making in Docket No. 12782, concerning rules with respect to competition and responsibility in network television broadcasting (30 Fed. Reg. 4065). While the Commission has from time to time disclaimed direct jurisdiction over networks, no definitive resolution of that question has been made by the courts. As to other forms of wire communication (*e.g.*, Muzak, press associations), most of them differ significantly from CATV in that their activities have little if any potential impact on broadcasting.

though the 86th Congress considered certain legislative proposals respecting CATV which were submitted by the Commission and others, the Commission at that time had deliberately reserved the question whether it could regulate CATV because of its impact on its channel-allocation plan. *CATV and TV Repeater Services,* 26 F.C.C. 403, 430–431. The Senate, by a close vote, tabled a bill conferring jurisdiction, but no legislation was enacted which either increased or reduced the Commission's powers under the 1934 Act. In the 89th Congress, after the Commission's assertion of jurisdiction, confirmatory legislation was introduced (H.R. 13286) and favorably reported (H. Rep. No. 1635, 89th Cong., 2d Sess.), but the issue of the Commission's jurisdiction under existing law was in the end left open (H. Rep. No. 1635, *supra,* at p. 9). Thus, neither the Commission's own prior ruling, nor its requests for CATV legislation or the actions of Congress foreclose the issue here. In the face of CATV's burgeoning growth, old assumptions had to be reconsidered in the light of the Act's full reach (cf. *American Trucking Ass'ns* v. *Atchison, T. & S.F. R. Co.,* 387 U.S. 397, 416). Moreover, requests by an agency for congressional guidance as to or confirmation of its jurisdiction have never been viewed as establishing a lack of existing authority (*e.g., Federal Trade Commission* v. *Dean Foods Co.,* 384 U.S. 597). Congressional inaction after the Commission assertion of jurisdiction over non-microwave CATV, if it shows anything, indicates acquiescence in the Commission's reading of the Act and approval of its proposed method of regulation.

Little comment need be made on the contention of respondents Mission Cable *et al.* (Br. 35–55) that the Commission is precluded from considering the effect upon the public of a loss of free television service due to competition from outside television signals brought into a community by CATV. The public interest standard of the Act plainly contemplates and comprehends consideration of the effect of competition upon service to the public in the regulated broadcasting industry.[2] *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475–476; *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U.S. 86; *Carroll Broadcasting Co.* v. *Federal Communications Commission,* 258 F. 2d 440 (C.A.D.C.); *Carter Mountain Transmission Corp.* v. *Federal Communications Commission,* 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951.

Apart from the jurisdictional basis heretofore dis-

[2] Mission also errs in suggesting that the policy of antitrust laws forecloses Commission consideration of the economic impact of CATV on its channel-allocation plan. The antitrust laws represent a basic statutory policy which should be taken into account by regulatory agencies. Nor can administrative action authorize violation of the antitrust laws or immunize transactions from them, except as specifically provided by Congress. But respondents do not suggest any substantial basis for concluding that the Commission's general requirements for carriage of local stations, non-duplication and limitation on importation of distant signals raise any serious anticompetitive problems. In any event, despite the contrary argument in the *amicus* brief of Black Hills *et al.* (Br. 7–10, 31–36), the validity of the substantive provisions of the Commission's rules are not presently before the Court, except in the sense that they provide background relevant to resolving the questions actually at issue. At least one of respondents agrees (see Southwestern Cable Br. 15).

cussed, CATV systems are plainly "incidental" to the transmission of radio communications (47 U.S.C. 153(b)), and thus come within the regulatory authority of the Commission on this ground as well. Title III of the Act is of course concerned only with "radio transmission," but it is significant that this term, as used in Section 301 and defined in Section 3(d), "includes both such transmission and all instrumentalities, facilities, and services *incidental to such transmission*" (emphasis added). Respondents are incorrect in asserting that consideration of this ground is foreclosed under *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80. This is because the "limited office" of the *Chenery* principle (see the *Penn-Central and N & W Inclusion Cases,* Nos. 433 *et al.*, this Term, Slip op., p. 28, n. 10, p. 36, n. 14), as the opinion itself points out, is inapplicable to review of general legal standards adopted by the exercise of rulemaking powers (318 U.S. 92–93). Thus, the jurisdictional basis of agency rules may be justified on any ground supported by the pertinent legislation.[3] Indeed, in its Second Report and Order (A. 70, n. 1) the Commission stated that since CATV operations clearly fall within either Section 3(a) or 3(b), or both, a determination of their precise status was not essential to resolution of the jurisdictional question.

Finally, Mission is incorrect in its assertion (Br. 52–53) that if unlicensed CATV carriage of signals

[3] In rulemaking, it should be noted, the Administrative Procedure Act requires only a general statement of basis and purpose (5 U.S.C. (Supp. II) 553 (c)).

is found to infringe copyrights, there is no need for any Commission regulation. This argument substantially ignores one of the essential reasons for Commission assertion of jurisdiction—the economic impact of CATV upon its channel-allocation plan which could in turn have a detrimental effect on the public. That consideration would be affected only in an indirect and imprecise way by a holding that CATV activities were covered by the copyright laws. Moreover, Commission regulation is geared to promotion of Communications Act policy. The Commission in its Second Report and Order noted that CATV systems have traditionally not paid for the programming they provide and that this has had adverse competitive consequences for UHF and independent stations (A. 12–13, 54–56). And account would have to be taken by the agency of any significant change in industry operations as a result of this Court's decision in *Fortnightly Corp.* v. *United Artists Television, Inc.*, No. 618, this Term, or subsequent legislative developments, even possibly to the extent of revising certain of its regulations. But Commission jurisdiction over CATV to insure "the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)), would at all events still be appropriate and would plainly remain necessary.

II

Respondents argue that even if the Commission has jurisdiction to regulate CATV dissemination of television signals by general rule, it cannot act by interim order to maintain the status quo in a particular

market while it determines the effect on local television service of CATV expansion. Such an order, they say, is an exercise of an injunctive power—or more precisely, a kind of temporary cease-and-desist order not authorized under Section 312(b) or any other provision of the Act. Respondents contend that such authority is not conferred by the Commission's general rulemaking powers under Sections 4(i) and 303(r);[4] that Congress has been extremely cautious in granting agencies temporary injunctive jurisdiction; and that the interim stay issued here does not meet judicial standards for injunctive relief. Finally, they assert that an interim stay order cannot be analogized to a particularized rule for the Los Angeles-San Diego market and that such a rule would be arbitrary in any event. These contentions are advanced in support of a general claim that it is wholly arbitrary for the agency to reserve to itself authority to issue orders which may vary its rules or impose special requirements in particular situations. None of these claims have substantial merit.

Respondents' fundamental premise—that the interim stay order of the kind here involved is in essense a type of cease-and-desist order—is unfounded. The interim stay here seeks only to prevent temporarily an increase in the importation of Los Angeles

[4] Respondents' reading of Section 4(i) would actually render that statutory provision virtually without meaning. Moreover, if their restrictive view of Sections 4(i) and 303(r) were correct, it would appear to follow that the Commission lacked authority to enter an order at the conclusion of an evidentiary hearing, and that this would be so whether the proceeding was one under Section 74.1107 of the regulations or, like the instant case, one under Section 74.1109.

signals into the San Diego area while the Commission endeavors to determine what the effect of such CATV expansion will be on San Diego's off-the-air television service. It serves precisely the same purpose as the Commission's general rule (47 C.F.R. 74.1107) forbidding the importation of distant signals into the top 100 television markets until a case-by-case investigation and evidentiary hearing can be conducted. The only difference between the general rule and the provisions authorizing particularized relief (47 C.F.R. 74.1109)—an integral part of which is the issuance of interim stay orders—is that under the former the CATV systems must establish a need for a waiver in the light of particular circumstances. Under the more flexible procedure followed here, the local television interests involved had the burden in the first instance of establishing a need for special protection pending a complete investigation.[8]

Unlike a cease-and-desist order, which imposes a restraint to correct a violation of an established standard, the proceeding here involved is directed toward particularizing the major-market policy in the San Diego area. It is not concerned with adjudicating and correcting past violations but with establishing a standard for future CATV dissemination of broadcast tele-

[8] One of the *amici* attempts to demonstrate that Section 74.1109 of the regulations, under which the Commission acted here, is so broad as to confer unlimited and therefore arbitrary authority on the agency (Black Hills, *et al.* Br. 37–42). But that section was plainly intended as complementary to the other regulations, particularly Section 74.1107, and should be viewed as part of the overall framework established by the Commission for regulating CATV. Thus, it comes into play only in those situations not specifically covered by the general rule.

vision signals in a particular market. Thus, the issue is not whether respondents are violating existing laws and rules but whether the Commission has the power by rule, order, or a combination thereof, to maintain the status quo in a television market while it studies the potential impact of CATV carriage of certain broadcast signals on its channel-allocation plan and on the public interest in local television service. It is in this light that respondents' reiterated statement that they have violated no statute or rule in seeking to expand their systems in San Diego—that their activities are "concededly lawful"—must be evaluated. It is beside the point that respondents do not happen to be in violation of any particular regulations at the present time, and misleading to seek to attribute any significance to this verbalization. Their proposed activities are not currently unlawful only because in this class of cases—one involving overlapping Grade B contours of two major markets—the Commission determined to proceed initially through case-by-case inquiries, accompanied by temporary restraints, rather than through a blanket ban on CATV expansion pursuant to a general rule covering such relatively uncommon situations.[6]

[6] Had the Commission fashioned a blanket ban on all CATV expansion in major markets, respondents would have been faced with a general rule automatically calling for a halt in their operations, with the necessity to seek and justify a waiver of the rule in their particular case. Instead, the Commission adopted the *ad hoc* approach of Section 74.1109 in situations like the present one, which distinctly favors CATV by not restricting expansion except where the Commission specifically acts to do so after examining the pleadings in a particular case. Respondents nowhere show why the Act requires the approach of a general

Sections 4(i) and 303(r) clearly confer on the Commission the power to proceed in the manner here chosen.[7] They are not, as respondents contend, simply housekeeping or enabling provisions which relate to the control of Commission proceedings. That function is specifically performed by another provision—Section 4(j) (47 U.S.C. 154(j)). See *Federal Communications Commission* v. *Schreiber,* 381 U.S. 279, 289–294. Sections 4(i) and 303(r), in contrast, are grants of power "coterminous with the scope of agency regulation." *American Trucking Ass'ns* v. *United States,* 344 U.S. 298, 309–311. In *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, in concluding that the Commission's rulemaking authority did not depend upon and was broader than any specific statutory authorization, this Court significantly stated that "47 U.S.C. § 154(i) and § 303(r) grant general rulemaking power not inconsistent with the Act or law" (*id.* at 203). As we have shown, the scope of the Commission's authority under Section 2(a) and Title III extend to the regulation of CATV carriage and dissemination of broadcast signals. Sections 4(i) and 303(r), therefore, authorize the imposition of permanent standards governing the importation of television sig-

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rule with possible waiver rather than the more flexible method prescribed by Section 74.1109 for those situations where the public interest questions could best be resolved, even initially, only upon the basis of specific facts.

[7] Section 4(i), in addition to the general rulemaking authority conferred by Section 303(r), broadly authorizes the Commission to "perform any and all acts" and to "issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

nals. *A fortiori,* those provisions authorize the imposition of temporary restraints on system expansion where permanent rules might eventuate from detailed agency inquiry which could effectively be frustrated if if the status quo were not maintained.[8]

Whether standards are to be expressed by rule or order or, as in this case, a selective combination among all of the agency's powers, is in the first instance a matter of agency discretion. If that discretion is exercised in a reasonable fashion, and the precise manner of regulation chosen fairly comports with the language and purpose of the pertinent statutory provisions, agency action should be upheld. In light particularly of the fast-changing character of the broadcasting industry, Congress never meant to undermine its purpose in establishing the Commission by seeking to spell out in a detailed manner the exact ways in which the authority granted should be exercised. *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 219. Rather, as Congress intended, the Commis-

[8] Both the general rule limiting importation in the top 100 markets pending investigation and the particularized action taken here are temporary in nature. Both are premised upon the serious questions raised by CATV entry into the major markets and the necessity for resolving those questions before CATV becomes entrenched. Such entrenchment would not only threaten frustration of any solution the Commission might ultimately reach but also threatens possible disruption of service to the public which subscribed to CATV before the legality of its use of distant signals was defined. Not only would the removal of wires into homes be required; CATV systems do not typically afford subscribers a choice between cable and off-the-air reception (see First Report and Order, 38 F.C.C. 683, 702–703), and many systems advertise that unsightly antennae can be done away with if CATV service is obtained.

sion can utilize the full panoply of its powers to innovate by fashioning procedures for coping with new developments and to tailor those procedures to the widely varying problems a development such as CATV presents in different markets. It is not confined, as respondents seem to argue, to a choice between rule and order, as this Court made clear in *Securities and Exchange Commission* v. *Chenery,* 332 U.S. 194, 202–204:

> To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. * * *
>
> * * * Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
>
> * * * And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency. See *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 421.

Here the Commission's interim stay procedures comply with the criterion of fundamental fairness and rest upon a rational foundation. Administrative proceedings are in any event not governed by judicial standards. *Federal Communications Commission* v.

Pottsville Broadcasting Co., 309 U.S. 134, 142–144. Moreover, the interim stay order was issued only after elaborate submissions by the parties and upon a considered Commission determination that, in view of those submissions, a halt to CATV expansion in San Diego was at least temporarily required, in order to allow the Commission an adequate opportunity to investigate the matter further (A. 146–179).[9] It is difficult to conceive that a court would not issue temporary injunctive relief in similar circumstances.

Nothing in the legislative history of Sections 4(i) and 303(r), referred to by respondents, undermines reliance on those provisions as a basis for the interim stay order issued here. It shows only that Congress intended to adapt the forms of the past to the changing needs of the future. Nor is the remedial pattern expressed in statutes relating to other agencies a guide to congressional intent here. The Commission's role and powers are distinctively adapted to the broadcasting industry in which, as Congress well understood, change is the only constant. Moreover, respondents do not show that the remedial patterns prescribed for other agencies parallel that of Sections 4(i) and 303(r), or that courts, in circumstances like the present one, have barred any agencies having such broad authority from taking analogous actions. Similarly, the fact that in 1960 the

[9] Respondents ignore the fact that the Commission did not act either *ex parte* or summarily in determining to issue the instant stay order, but upon the basis of voluminous pleadings and affidavits. Moreover, respondents were aware, from participation in the extensive rulemaking proceeding and by virtue of specific references in the Second Report and Order, that the Los Angeles-San Diego situation was one as to which the Commission might find some action to restrict importation of signals appropriate (see, *e.g.*, A. 18–19).

Commission's chairman suggested that the Commission should be empowered to obtain judicial stays of activity in violation of the Act or Commission rules is of no significance. That is not the question in issue here, and in any event Congress's failure to adopt it is no indication that the power does not exist. *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 608–611.

Finally, it is inconsistent with the nature of the administrative process to suggest, as do respondents, that in circumstances such as these, an agency may not reserve to itself authority to issue orders which vary its rules or to impose special requirements as particular situations may demand.[10] Such powers are the very essence of the administrative process. They were conferred on the Commission when it was assigned its mission of regulating the broadcasting industry, and were properly exercised here to maintain temporarily the status quo in the San Diego market.

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[10] Respondents' reliance on the hearing examiner's determination that CATV development in San Diego does not presently appear to threaten local television service is misplaced. His findings are under review by the Commission which must itself decide the case on the record before it and is not bound by his determination. Moreover, respondents neglect to note that the Commission staff has concluded that the examiner's report contains numerous factual and legal errors. Significantly, in view of these exceptions, the Commission itself declined to terminate the temporary stay until it had considered the examiner's findings and reached its own decision (see *Memorandum Opinion and Order*, 11 Pike & Fischer R.R. 2d 721, 724).

CONCLUSION

For the foregoing reasons, and those stated in the principal brief for petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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